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BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Establish Policies and Rules to Ensure Reliable, Long Term Supplies of Natural Gas to California	R.04-01-025

AMICUS CURIAE BRIEF OF
CALIFORNIA ATTORNEY GENERAL
BILL LOCKYER

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October 27, 2006

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OF THE STATE OF CALIFORNIA

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APPLICATION TO FILE *AMICUS CURIAE* BRIEF BY CALIFORNIA ATTORNEY GENERAL BILL LOCKYER

Attorney General Bill Lockyer respectfully requests permission to file a brief as *amicus curiae* in support of the request filed by the South Coast Air Quality Management District (SCAQMD) for reconsideration of Decision 06-09-039, asking that the Commission comply with the California Environmental Quality Act (CEQA) prior to adopting tariffs that allow high Wobbe natural gas to be imported and used in this state.

The Attorney General has special expertise in the interpretation and enforcement of (CEQA), both because of his general responsibilities as the State's chief law officer to see that the laws are appropriately enforced, and from the special responsibilities for the enforcement of CEQA assigned by the Legislature to the Attorney General. (*Schwartz v. City of Rosemead* (1984) 155 Cal.App.3d 547, 561; Pub. Res. Code §2167.6; Code Civ. Proc. § 388.)

The Legislature intended that the Attorney General may participate in any judicial proceeding involving CEQA, as shown by Public Resources Code § 21177(d), which excuses the Attorney General, and only the Attorney General, from the legal requirement to have exhausted administrative remedies before bringing or entering a CEQA case. The Attorney General is also specially charged by the Government Code with protection of the California environment and its natural resources. (Govt.Code § 12600, et seq.) He is authorized to participate in any judicial proceeding that may impair or destroy the natural environment or resources of this State. (Cal. Const., art. V, § 13; Gov. Code § 12600-612; *D'Amico v. Board of Medical Examiners* (1974) 11

Cal.3d 1, 14-15.) While this is a rulemaking proceeding and not a judicial one, the possibility of harm to the natural environment and the scope of such possible harm are issues in this proceeding, and the Attorney General seeks to participate as *amicus curiae* to fulfill his responsibilities to protect the natural resources of the State. He also hopes that his special expertise in CEQA law and policy may be of assistance to the Commission.

On that basis, the Attorney General asks that the attached brief be received, filed, and considered by the Commission.

Respectfully submitted,

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AMICUS CURIAE BRIEF OF CALIFORNIA ATTORNEY GENERAL BILL LOCKYER

INTRODUCTION

The PUC is about to finalize a decision that can affect California for decades, a decision to allow the importation and use of LNG that will be processed into natural gas that burns hotter than the gas that California has burned historically, hotter than the gas to which power plant gas turbines, commercial boilers and heaters, and home appliances all over the State have been designed and tuned. The Commission has been presented with evidence from producers that they need the PUC to provide them with the regulatory certainty that they can use gas that measures much higher, up to 1400 on the Wobbe Index[1/], than gas historically burned in California. They argue that they need this regulatory certainty, in the form of tariffs that explicitly allow the burning of high-Wobbe gas, in order to have the confidence to build LNG facilities that will regassify and process LNG imported from Asia and other locations into high-Wobbe natural gas for use in California. The PUC has also been presented with evidence from gas producers, gas users, and the South Coast Air Quality Management District (SCAQMD) that the use of this

1. A measurement tool that takes into account both the heat content of natural gas and its chemical composition.

high-Wobbe gas will increase the production and emissions of nitrogen oxides (NOx) from gas-burning sources ranging from home appliances to huge gas turbines. The SCAQMD has presented evidence and its expert opinion that this increase in NOx may harm both air quality and public health. Many parties have presented a variety of sometimes contradictory information about the extent of that potential environmental harm, and whether or how it might be mitigated; nearly all parties have agreed that additional tests and studies would produce information that could help define the air pollution effects of the use of high-Wobbe gas.

The SCAQMD, the agency directly responsible for, and most knowledgeable about, air quality in the South Coast Air Basin, has asked the PUC to reconsider its decision. The SCAQMD asks the PUC to refrain from making its decision final until the Commission has complied with the California Environmental Quality Act (CEQA, found at Public Resources Code section 21000, *et seq.*). Such compliance would required the PUC to develop and gather the relevant environmental facts, make those facts public, consider those facts along with the public, and adopt all feasible mitigation for the harm the decision may do to the most heavily polluted air basin in the nation, and to the millions of people who live there. The PUC has declined to do so.

The Attorney General submits this brief because he respectfully disagrees with the PUC that Decision 06-09-039 is not subject to the CEQA. The approval of tariffs allowing the importation and use of natural gas with higher Wobbe Index numbers than gas historically used in California[2/] is a discretionary action by the PUC, and a fair argument, based upon substantial evidence in the

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2. Although Decision 06-09-039 concerned many more topics than the Wobbe Index number, for convenience, this brief will refer to "the Decision" even though it is only the Wobbe number provisions with which the brief is concerned.

record, has been made that it may have a significant adverse effect on the environment. As such, the Decision is a project subject to CEQA, and the PUC must carry out the CEQA process before approving the tariffs. Indeed, given the seriousness of the public health implications of any increase in ozone concentrations in the South Coast Air Basin, and the plethora of unanswered or only partially answered technical and environmental questions about the potential of high-Wobbe gas to increase those ozone concentrations, the Decision is a classic example of a situation where CEQA compliance will perform one of its main functions: reassuring an apprehensive citizenry that the PUC is making crucial decisions with environmental values -- and full environmental information -- firmly in mind.

While taking no position on the ultimate outcome of the rulemaking itself, the Attorney General urges the PUC to grant reconsideration, and to prepare and certify a full environmental impact report (EIR) on this matter.

ARGUMENT

I. ADOPTION OF THE TARIFFS IS A "PROJECT" SUBJECT TO CEQA

A. CEQA Requires Both Full Environmental Disclosure and Adoption of All Feasible Mitigation, and Mandates Compliance Even if That Compliance Does Not Ultimately Change the Agency's Decision.

CEQA binds all agencies and all levels of government in California to its twin policies of full environmental disclosure and the fullest feasible environmental mitigation. (Public Res. Code §§ 21001, 21001.1, 21002.1,21080.) The courts have, from the very beginning, resisted any "grudging or miserly reading" of the statute (*Bozung v. LAFCO* (1975) 13 Cal.3d 263, 274), and have held that CEQA must be broadly interpreted, to give the greatest possible protection to

the environment that is consistent with the statutory language. (*Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259.) Both the decision maker and the public – which CEQA places in "a privileged position" in this regard (*Concerned Citizens of Costa Mesa v. 32nd District Agricultural Assn.* (1987) 42 Cal.3d 1029, 936 – must have full information about the environmental effects of any governmental decision with the potential to do environmental harm. The public is entitled to know the full "environmental price tag" of a project *before* it is approved. *NRDC v. City of Los Angeles*, 103 Cal.App.4th 268, 271.

CEQA also provides that no agency approve a project that may harm the environment unless it considers all feasible alternatives and adopts all feasible mitigation. (Public Res. Code section 21002, 21081.) The twin duties under CEQA of disclosure and mitigation apply even if the agency's decision would have been the same without CEQA. (Public Res. Code sec. 21005, subdivision (a); *Resource Defense Counsel v. Local Agency Formation Commission of Santa Cruz County* (1987) 191 Cal.App.3d 886, 897-898.)

B. Adoption of the Proposed Tariffs and Their Wobbe Index Numbers is a Project for CEQA Purposes.

There are three elements that make an action subject to CEQA: 1) a public agency must either directly undertake the action or must give permission or support to a private entity to take the action; 2) the public agency's action or permission must be discretionary and not ministerial; and 3) the action must be of a kind that may reasonably be expected to have a substantial adverse effect on the environment. (Public Res. Code sections 21065, 21068.) Consistent with our Supreme Court's holding that "[t]he foremost principle under CEQA is that the Legislature intended the act to be interpreted in such manner as to afford the fullest possible protection to the

environment within the reasonable scope of the statutory language" (*Laurel Heights Improvement Assn. v. Regents* (1989) 47 Cal.3d376, 390 (internal quotes omitted)), the term "'[p]roject' is given a broad interpretation in order to maximize protection of the environment." (*McQueen v. Board of Directors* (1988) 202 Cal. App. 3d 1136, 1143.) Here, the Decision is the approval of tariffs for several utilities that will allow those utilities to import, distribute, and use gas with higher Wobbe Index numbers than historic gas used in California.

This action is being taken by a public agency[3/], and is a form of permission for action by private and publicly owned entities, satisfying the first prong of the test for a project subject to CEQA. It is a discretionary action by the agency – here, a discretionary rulemaking on the part of the PUC – satisfying the second prong.

There remains only the third prong of the test for an action, or project, that triggers CEQA: does the action have the potential for significant adverse effects on the environment? The record here shows that the Decision also satisfies this third prong of that test. Substantial evidence shows that the Decision can reasonably be expected to lead to a substantial and adverse effect on the physical environment, at least in the South Coast Air Basin. Testimony, including testimony from experts, in the record shows that the burning of higher Wobbe gas will result in greater amounts of nitrogen oxides (NOx) being emitted into the air than the burning of gas with historic Wobbe numbers. Sempra's expert Les Bamburg testified that use of gas with a Wobbe number of 1400 could produce an increase in NOx emissions of 1.7 tons per day statewide, and of 0.7

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3. The CEQA Guidelines, found at Cal. Code of Regs., tit. 14, sections 15000, *et seq.* (hereafter, "CEQA Guidelines" or "Guidelines"), define a "public agency"to include "any state agency, board, or commission", as well as certain regional agencies. (Guidelines, section 15379.) The PUC clearly qualifies.

tons per day in the South Coast Air Basin from residential appliances alone. (Bamburg Direct, p. 5, ll. 9-15.) San Diego Gas and Electric (SDG&E)'s and Southern California Gas (SoCalGas)'s expert Joseph Hower testified that use of the higher Wobbe gas for half the supply in the South Coast Air Basin would result in an increase of 1.2 tons per day of NOx emissions there. (TR, p. 715, ll. 16-21.)

The SCAQMD's expert, Dr. Liu, gave his opinion that this increase in NOx emissions would indeed have a significant, adverse effect on air quality in the South Coast Air Basin, and that the amount of NOx emissions in question was equal to those targeted by many SCAQMD regulations. (TR., p. 731, ll. 14-21.) His opinion was joined by the Executive Director, Dr. Wallerstein, of SCAQMD, which is the technical agency responsible for air pollution control in the South Coast Air Basin. (TR. 1649, ll. 18-23.) Dr. Lui also gave his expert opinion that the NOx emissions increase would adversely affect the concentration of particulate matter in the South Coast Air Basin. (TR. p. 770, ll. 9-12.) Thus, the agency with both the primary legal authority, and the most specific technical expertise, with respect to air pollution in the South Coast Basin presented testimony and expert opinions that the use of high-Wobbe gas in that basin will have a significant adverse effect on the environment. This satisfies the third prong of the test for a "project" for CEQA purposes, and CEQA therefore applies to this proceeding and to the Decision unless it falls within some exemption to the statute.

An agency action may be found exempt from CEQA only if it is the subject of a statutory or regulatory exemption, if the agency rejects or disapproves the action, or if "it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment". (Guidelines, section 15061(b), and 15061(b)(3).) That is not the case here.

The PUC has claimed no statutory exemption from CEQA. Neither does it claim a regulatory, categorical exemption from CEQA, nor could it. The action could not qualify for a categorical exemption, since no categorical exemption may be granted where there is a fair argument, based on substantial evidence, of an adverse environmental effect. (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 124 ("an activity that may have a significant effect on the environment cannot be categorically exempt."))

The presence in the record of testimony and expert opinion that disagrees with Dr. Lui and SCAQMD does not make the action a non-project, or exempt it from CEQA. We note that both Mr. Bamburg and Mr. Hower disagreed with Drs. Lui and Wallerstein as to the significance of the NOx increase, giving their opinions that the amount of increased NOx emissions in the South Coast Air Basin would not be significant. Mr. Bamburg considered that amount to be small in comparison with the overall NOx emissions inventory (Bamburg Direct, p. 5, ll. 18-19), and Mr. Hower testified that, based on air quality modeling done in the past by his firm, Environ, he believed that this increase in NOx emissions would not have a detectable effect on the amount of ozone in the air of the South Coast Basin. (TR, p. 761, ll. 3-7.) However, Dr. Lui testified that the kind of air quality modeling to which Mr. Hower referred would not show a direct effect from the NOx increases at issue here because of the non-linear nature of the photochemical processes by which ozone is produced from NOx and hydrocarbon emissions in the air, but that this amount of NOx increase would nonetheless be significant. (TR., p. 769, l. 25 to 770, l.8.) None of these experts disputed that NOx emissions would rise; they differed only in their assessment of the significance of that emissions increase.

There is disagreement among the experts here as to the significance of the NOx increases to be expected from high-Wobbe gas, but a mere disagreement among experts on the significance of a potential environmental effect does not allow an agency to claim an exemption from CEQA for an action. On the contrary, it is well established law that, "if there is a disagreement among experts over the significance of an effect, the agency is to treat the effect as significant and prepare an EIR." (*Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1316; Guidelines, section 15064(g); *accord, Quail Botanical Gardens Foundation, Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1607.) In fact, the resolution of disputes among experts has been to be one of the "invaluable function[s]" that an EIR can provide. (*City of Carmel-by-the-Sea v. Board of Supervisors* (1986) 183 Cal.App.3d 229, 249.)

There is also substantial evidence in the record that the full extent of the increase in NOx emissions that the Decision may cause is not yet known. Several witnesses testified that, while SoCalGas did testing on a limited number of consumer appliances (TR, p. 1639, thirteen appliances tested), it did not test large gas-fired turbines to find out the extent to which high-Wobbe gas might increase their NOx emissions (TR p. 798, l. 14 - p. 800, l. 2; p. 805, ll. 7-12; TR p. 1128, l. 26 - p. 1129, l. 7; TR p. 1145, l. 23 - p. 1146, l. 1; TR p. 769, ll. 6-24), despite their widespread use in California. (TR p. 1214, ll. 15 - 27.) Tests by SCAQMD on equipment of various sizes showed that, of about 140 boilers and heaters tested, 40% exceeded permissible NOx levels on high-Wobbe gas, some very significantly. (TR p. 744, ll. 11-20.) Many witnesses testified that we simply do not know how many types of equipment will perform on high-Wobbe gas until testing or real-world experience shows us. (Pando Direct, p.3; TR p. 901, ll. 21-27; TR

p. 915, ll. 10-22; TR p. 1109, l. 1 - p. 1110, l. 7; TR p. 1133, ll. 13-21.)[4] The full environmental harm that may result from the use of high-Wobbe gas may not be known, and its full limits cannot be shown with any certainty at this time and on this record. This evidence adds to the force of the substantial evidence already in the record that the Decision may cause a significant adverse effect on the environment, and that CEQA thus applies to it. Neither can the PUC be certain that such measures as tuning or re-tuning gas-burning equipment can avoid the NOx emissions increases, given the disagreement among experts in the testimony about its efficacy and how extensive its use might be. (TR p. 823, ll. 8 - p. 824, l. 18; TR p. 1097, l. 11 - p. 1098, l. 19; TR p. 1141, l. 9 - p.1142, l. 8.) The inescapable conclusion that must be drawn from the record is that the Decision is a discretionary action that has the potential for significant environmental harm and, as such, is subject to the full CEQA process.

C. The Decision is Sufficiently Related to High-Wobbe's Potential to Cause Environmental Harm to Trigger CEQA.

The Decision concludes that the tariffs do not constitute a "project" that is subject to CEQA. The Attorney General respectfully disagrees.

The Decision's essential argument in support of its conclusion that revising the Rule 30 tariff is not a project under CEQA[5] is lack of causation. First, it argues that the Decision is not

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4. There were also serious questions raised by various experts as to the effects of the high-Wobbe gas on the performance and reliability of large gas turbines currently in use in California. Luis Pando testified for Southern California Edison ("Edison) that General Electric, the manufacturer of Edison's Mountainview gas turbines, cannot or will not guarantee that those turbines will perform adequately on high-Wobbe gas. (TR. p. 723, ll. 3-12.) Uncertain performance of large turbines may itself lead to environmental effects, if units go out of service and higher-emitting units are used in their stead.

5. The PUC does not argue that the Decision is ministerial and therefore does not meet the first criterion for a CEQA project: that the action be a discretionary decision.

"an essential step" towards the importation of higher Wobbe Index gas into California and its use by utilities and consumers. (Dec. p. 168.) The implication is that no environmental harm will result until and unless actual LNG plants are built that will produce and ship the higher Wobbe gas.

This line of reasoning has long been rejected by California courts. In essence, the Decision is arguing that environmental harm will only flow when actual LNG facilities are licensed and built, and the first governmental decision that is "essential" in that process is the direct permit to build. This is a disingenuous argument that ignores real-world facts in the record. The Decision here *is* an essential step in the process of building those LNG facilities, because it authorizes the importation and sale of the product the future LNG facilities will produce, high Wobbe natural gas from LNG. That it is a step removed from a direct construction approval does not make it any less "essential" for CEQA purposes.

As the California Supreme Court held in *Laurel Heights Improvement Assn. v. Regents* (1989) 47 Cal.3d 376, 395 (internal quotation marks omitted), CEQA requires that the environmental consequences of governmental actions be examined "as early as feasible in the planning process", so that environmental considerations can best influence the design and progress of that process. Such early compliance with CEQA can avoid or lessen environmental damage that may be much harder to stop once a planning process a good head of steam. (*City of Antioch v. City Council of Pittsburgh* (1986) 187 Cal.App.3d 1325, 1333 ("Under CEQA, the agency must consider the cumulative environmental effects of its action before a project gains irreversible momentum."); *Environmental Council of Sacramento v. City of Sacramento* (2006)

142 Cal.App.4th 1018, 1031 ("California courts, in construing the Guidelines, are sensitive to the steamroller effect of development."))

The record shows that the Decision is indeed an essential step towards use of high-Wobbe gas in California. Certainly, the gas producers involved in the rulemaking did not perceive the Decision as inessential, nor does the Decision itself do so. Sempra's expert Les Bamburg testified that not only was the change in tariffs needed, it was needed almost immediately:

> [T]he Commission must modify the gas interchangeability specifications by the end of this year in order to provide new and existing gas suppliers, as well as end-use customers, with certainty respecting the gas interchangeability specifications that will be in place on a long-term basis.

(Bamburg Prepared Direct Testimony, p. 3.) The Decision accepts this argument, finding as facts:

> 45. Approving changes to SDG&E's and SoCalGas' tariffs now will provide regulatory certainty to LNG developers and other potential natural gas suppliers.
>
> . . .
>
> 65. LNG developers need regulatory certainty today to design and build LNG import projects and arrange for sources of LNG supply.

(Decision, Findings of Fact.)

The Decision paves the way for the construction of LNG projects and procurement of LNG supplies that will bring high-Wobbe gas into California. It is regarded by both gas providers and the PUC itself as essential to provide regulatory certainty for gas suppliers; the Decision is

intended, by its own terms, to provide the certainty that will encourage gas suppliers to lay down the infrastructure and make the investments that will bring LNG supplies of high-Wobbe gas to this State. While not an actual permit, it is a commitment by the PUC to allow the use of this gas. This is the point at which "environmental review would be an integral part of the decisionmaking process. Any later environmental review might call for a burdensome reconsideration of decision already made and would risk becoming the sort of post-hoc rationalization to support action already taken which our high court [has] disapproved. . . ." (*Citizens for Responsible Government v. City of Albany* (1997) 56 Cal.App.4th 1199, 1221, internal quotation marks omitted.) As the point at which the PUC is making a commitment to a course of action with the potential to harm the environment, the Decision is a project subject to CEQA. (Guidelines, section 15352.)

The Decision also asserts that it is not a project for CEQA purposes because the current tariffs can be read to allow the use of high-Wobbe gas, and some high-Wobbe gas already reaches California, e.g., through the Kern River pipeline. (Dec. p. 169, nt. 269.) However, CEQA is a practical statute. Its focus is the reality of what is occurring and will occur in the physical environment, what is actually on the ground, and not what is merely contemplated to occur or may theoretically occur. (*Christward Ministry v. Superior Court* (1986) 184 Cal.App.3d 180, 190.) It is the existing physical conditions, as they exist, that form the baseline against which the potential effects of a project are measured, and not the full extent of what is legally permitted but not present in reality. (Guidelines, sections 15125(a), 15126.2(a); *City of Carmel-by-the-Sea v. Board of Supervisors* (1986) 183 Cal.App.3d 229, 246-47 (effects of rezoning are evaluated by comparing project with existing physical conditions, not full build-out allowed by

zoning); *Wal-Mart Stores, Inc. v. City of Turlock* (2006) 138 Cal.App.4th 273, 289 (baseline conditions against which project's changes are evaluated are current physical conditions); *accord, Bloom v. McGurk* (1994) 26 Cal.App.4th 1307, 1315, nt. 3.) The fact that tariffs for utilities involved in this rulemaking may theoretically allow higher Wobbe gas than these utilities are currently burning does not define the baseline conditions, the gas that they have been and are currently burning does.

Even within an existing range of legal permission, such as zoning or a general plan, if an activity is intensified in a way that may have a significant adverse effect on the environment, CEQA can be triggered. (*Lighthouse Field Beach Rescue v. City of Santa Cruz* (2005) 131 Cal.App.4th 1170, 1196-97 ("nothing in the baseline concept excuses a lead agency from considering the potential environmental impacts of increases in the intensity or rate of use that may result from a project.")) Here, as in the *City of Carmel* and *Lighthouse* cases, an overall plan (here, tariffs) exists that can be read to authorize greater or more intensive use of a resource (here, the air basin's carrying capacity) than is currently being made. A proposal to authorize more intensive use of that resource is a project here, just as it was in those cases, where it may have an adverse environmental effect. With respect, the Decision is incorrect; this is a project and subject to CEQA.

II. THE POLICY OBJECTIVE OF EXPANDING NATURAL GAS SUPPLIES IN CALIFORNIA DOES NOT AND CANNOT EXCUSE THE PUC FROM COMPLYING WITH CEQA.

The Decision asserts that uncertainty about the environmental consequences should not stop high Wobbe gas from coming in now, that the environmental harm from approving the tariffs can be observed and dealt with after approval. (Dec. at 156-7.) Whether or not, as a policy matter,

that is correct, it does not change the statutory mandates of CEQA that bind the PUC. Once CEQA has been shown to apply to a project, as the Attorney General believes it has here, compliance with all its substantive and procedural requirements is not optional, it is mandatory. There is no question that the PUC is the decision maker here, and that it has the authority to make the ultimate decision, in accordance with its substantive statutory responsibilities. However, CEQA "is an integral part of any public agency's decision making process", and cannot be waived or deferred by the PUC. (Pub. Res. Code section 21006.)

CEQA is both a substantive *and* a procedural statute. As a substantive statute, CEQA requires that governments not approve a project that can harm the environment unless they have adopted all feasible mitigation of that harm, and examined all feasible alternatives to the project. (Pub. Res Code § 21002, 21081(a); *Mountain Lion Foundation, supra*, 16 Cal.4th at 134.) As a procedural statute, CEQA has detailed and comprehensive requirements to ensure that governments make full environmental disclosure to the public as to the potential of a project to harm the environment and what the government is requiring to mitigate or avoid that harm. (Pub. Res. Code § 21001.2.) CEQA's full disclosure provisions create public rights to all relevant environmental information about a project, rights that citizens "hold as members of the public." *Environmental Law Fund, Inc. v. Town of Corte Madera* (1975) 49 Cal.App.3d 105, 114.[6/] CEQA does not give government officials the ability to waive these rights, or to waive the ability to enforce these rights, on behalf of the public that holds them. *Waste Management of*

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6. CEQA's commitment to full public disclosure and full public participation is pronounced and extraordinary. It includes liberalized rules of standing, *Kane v. Redevelopment Agency*, 224 Cal.App.3d 899, 904 (1986), and exhaustion of remedies, *California Aviation Council v. County of Amador*, 200 Cal.App.3d 337, 341 (1988)

Alameda County v. County of Alameda (2000) 79 Cal.App.4th 1223, 1236-1237. Even if, on the whole, the agency believes that the effect of an action may ultimately be a net benefit to the environment, if there is substantial evidence of a substantial adverse effect, CEQA applies to the action and is not waived. (*Lighthouse Field Beach Rescue v. City of Santa Cruz* (2005) 131 Cal.App.4th 1170, 1197.)

The Legislature considered the procedural portion of CEQA so important that it provided that a prejudicial and reversible abuse of discretion may be found if the procedural requirements of CEQA have not been complied with, regardless of whether full compliance would or would not have changed the decision made by the public agency. (Pub. Res. Code § 21005(a); *Planning and Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 912 ("when an agency fails to proceed as required by CEQA, harmless error analysis is inapplicable.")) If the deviation from CEQA procedure deprives the public of an opportunity for meaningful participation and comment, it is reversible error, even if the public agency would make the exact same decision either way. (*San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 721-722.)

The substantive side of CEQA is perhaps even more important, since it helps agencies carry out the Legislature's mandate that "long-term protection of the environment . . . . shall be the guiding criterion in public decisions." (Pub. Res. Code section 21001, subdivision (d).) The CEQA process is intended to assist in that process, by enabling agencies to examine feasible alternatives or adopt feasible mitigation measures for the projects they carry out or approve. (Public Res. Code section 21002.) If, once an agency goes through the CEQA process, it finds that it cannot fully avoid or mitigate environmental harm from a project, CEQA *at that point*

allows an agency to approve the project despite its residual environmental harm, providing that the agency can make the findings required by Public Resources Code section 21801. That section requires that the agency make findings that all feasible mitigation has been adopted, and that overriding considerations justify approving an environmentally harmful project. The PUC may be allowed by CEQA to approve the tariffs in question, even if they harm the environment, but the PUC will not possess that power or authority until and unless the CEQA is completed, with full disclosure made and all feasible mitigation adopted. What the Decision here attempts to do is premature and flouts the order of the process mandated by CEQA. The analysis and disclosure must come first, and mitigation must be adopted, *before* the approval, not afterwards.

The Attorney General does not question the good faith of the PUC in wishing to expand the supply of natural gas in California, and he recognizes that this policy decision ultimately rests with the PUC. However, no good-faith belief on the part of the Commissioners that approval of these tariffs is in the best interests of California – or even of California's air quality – can authorize the PUC to approve the tariffs without complying with CEQA. CEQA requires that the decision makers have certain kinds of information even if the decision makers themselves do not feel they need it, and it requires that the public have that information as well. The full CEQA process must be carried out before the tariffs may be acted on by the Commission.

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CONCLUSION

For all the reasons given above, the Attorney General urges the Commission to comply with CEQA with respect to the Decision.

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

TOM GREENE
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October 27, 2006

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing document **"*AMICUS CURIAE* BRIEF OF CALIFORNIA ATTORNEY GENERAL BILL LOCKYER" in R.04-01-025** by using the following service.

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Executed in San Francisco, California, on the 27th day of October, 2006.

/s/ BESSIE WONG

Bessie Wong

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